APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1503

NORMAN L. LONGVAL,
Petitioner, Appellant,

v.

LAWRENCE R. MEACHUM, ET AL.,
Respondents, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner,
U.S. District Judge]

ON REMAND FROM THE SUPREME COURT

Before
Coffin, Chief Judge,
Aldrich and Bownes, Circuit Judges.

Judge Leubsdorf, Associate Professor of Law, Court appointed counsel, for appellant.

Barbara A. H. Smith, Assistant Attorney General, Chief, Criminal Appellate Division, with whom Francis X. Bellotti, Attorney General, was on brief for appellees.

November 24, 1982

ALDRICH, Senior Circuit Judge. The Supreme Court, on petition for certiorari in this habeas corpus proceeding, vacated the judgment resulting from our earlier opinion, Longval v. Meachum, 651 F.2d 818, (1st Cir. 1981), and remanded for further consideration in the light of Goodwin v. United States, U.S. , 102 S.?Ct. 2485 (1982). Following remand, we called for brief and heard oral argument. Unhappily, we think that because of a collateral remark in our opinion, seized upon by respondents, the issue in this case may have been misunderstood by the Court.

In respondent's petition for certiorari a given ground was,

> "The court further held that since the trial judge's participation in plea bargaining raises the 'possible appearance of vindictiveness' the case need be remanded for sentencing by a judge other than the one who presided at trial." (Emphasis suppl.)

In point of fact, this is not a plea bargaining case. The respondents had no basis for so indicating except that we quoted from a plea bargaining case[1/] in support of our conclusions. Rather, this is a case where there had been no bargaining, and the trial court, sua sponte, informed the defendant that if he did not follow its advice to bargain and plead, it "might be disposed to impose a substantial sentence" if the jury convicted him.

Concedely it is true that we spoke once in terms of "a possible appearance of vindictiveness," which, standing alone, might be misinterpreted. A fair account, however, would have noted that our meaning was what that appearance led to, viz., "a reasonable apprehension of vindictiveness,"

1/ United States v. Werker, 535 F.2d 198, 203 (2d Cir.), cert. denied, 429 U.S. 926 (1976). See 651 F.2d at 821.

the phrase used in Blackledge v. Perry, 1974, 417 U.S. 21, at 28, and which we quoted three times. The substance of our opinion was that the trial judge's apparent attitude, whatever his actual intent, had unconstitutionally created this apprehension, and that this was in no way dissipated by the sentences thereafter imposed. We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The undisputed facts are that near the close of the prosecution's case the trial judge addressed defense counsel essentially as follows:

> "Mr. Primason, the evidence in this case as it is coming in is very serious -- robbery of a drug store; taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial."

The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference between defense counsel and the prosecutor. Rather, they came out of the air, and ended with a recitation of the judge's power and disposition that could well be read as "plea or else." Whatever his actual state of mind, or purpose, we ragard the judge's mid-trial interjections as susceptible of appearing from the defendant's perspective to be an attempt to

coerce him to plead. Defendant refused and stood trial.[2/]

After conviction, the judge sentenced defendant to thirty-two to forty years in the state penitentiary on the armed robbery charges, and concurrent terms of eight to ten years on the counts for gun carrying and assault, to be served from and after the sentence for armed robbery. Thus, defendant was sentenced to a total of forty to fifty years. The assault sentence exceeded the statutory maximum, and both of

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2/ The Commonwealth argues that the fact that the defendant continued with the trial and took the stand shows that there was no coercion. This is beside the point; it does not negate the appearance of an attempt, nor dispel the possibility of a retaliatory sentence. The fact is, although we do not rest our decision on it, that defendant, on the stand, may well have felt coerced, as he freely admitted his participation in the robbery. His unfavorable testimony was that his co-defendant was not involved, a contention the jury ultimately agreed with.

these lesser charges were basically, in terms of conduct, included in the armed robbery count, as the Massachusetts Appellate Division essentially recognized. On appeal it reduced the principal sentence to thirty to forty years, the assault to five, and ordered all setences to be served concurrently. This effectively cut ten years off the defendant's sentence, but since the court was without knowledge of the judge's remarks to counsel that are the basis of the present proceeding, we cannot regard this as rectification. In the absence of indication to the contrary, we assume that the Appellate Division includes in its consideration the sentences originally imposed.

Defendant complains of the disparity between the three-year sentence in the house of correction given his co-defendant who pleaded guilty and the lengthy prison

sentence given him. The Massachusetts court justified this on the basis of a comparison of their prior records. We do not pursue this, except to note that the trial court voiced no explanation, in contrast to the practice often found appropriate because of the circumstances. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (quoted in United States v. Goodwin, 102 S.Ct. at 2489); United States v. Miller, 589 F.2d 1117, 1137-39 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979) (per curiam). What we do say is that the on-the-surface differential, and the total sentence imposed, are too great to allay a reasonble apprehension that the sentencing judge's original remarks were unjudicial urgings to plead, and that the sentences were a retaliatory consequence of the defendant's refusal.

The apparent judicial coercion is more serious than alleged prosecutorial coercion involved in Goodwin, we dealt with generally in our earlier opinion, and need not repeat in full. The distinction particularly important in the present case, however, is this. By hypothesis, the prosecutor and the defendant are adversaries and are expected to be at odds with one another. As pointed out in Goodwin, in the give and take of pretrial proceedings it is all too easy to call any particular undertaking a threat, even when it is not. A judge, however, is expected to be impartial, and to appear impartial. It is difficult to reconcile with impartiality a forceful recommendation to consider pleading, ending on a note of the judge's power to impose a substantial sentence if not complied with.

We would distinguish this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining. This language was far different. We would add, if respondent wishes to speak in terms of plea bargaining participation, that the judge in effect participated in plea bargaining in advance. If plea bargaining had ensued, his volunteered attitude would clearly seem to have strengthened the prosecutor's hand. Advice to plea bargain "or else," would not gladden the heart of bargaining defense counsel.

A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted, Commonwealth v. Longval, 390 N.E.2d 1117, 1120 (1979), even if counsel were willing to suffer the reputation with the bench that this would be likely to give

him, would impose an almost impossible burden. We believe the present case, and our decision, fall squarely within the Court's reasoning in Goodwin, rather than without it. The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice other than the one who presided at his trial.

United States Court of Appeals
For the First Circuit

No. 80-1503

NORMAN L. LONGVAL,

PETITIONER-APPELLANT,

v.

LAWRENCE R. MEACHUM, Et Al.,

RESPONDENTS-APPELLEES.

APPEAL FROM THE UNITED STATED DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Corey M. Belobrow, Boston University Law Student, with whom *John Leubsdorf*, Associate Professor of Law, Court appointed counsel, *Jeffrey Lesser*, *Christine Schwab*, and *James R. Wacht*, Boston University Law Students, were on brief, for appellant.

Annette C. Benedetto, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Barbara A.H. Smith*, Assistant Attorney General, Chief, Criminal Appellate Division, were on brief, for appellees.

June 19, 1981

BOWNES, *Circuit Judge*. Appellant Norman Longval appeals from a judgment of dismissal entered by the United States District Court for the District of Massachusetts denying his petition for habeas corpus. The petition challenged Longval's original forty to fifty-year prison sentence as an unconstitutional punishment for his exercise of the right to trial. We reverse and remand for resentencing de novo.

Longval was indicted jointly with Richard T. Ellard and Kenneth M. Golden on two charges of armed robbery of a pharmacy, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. Ellard pled guilty to all indictments[1] and was given sentences totalling three years in the Billerica House of Corrections — two years on the assualt with a dangerous weapon charge and one year on the motor vehicle charge — and a consecutive term of three years' probation. Longval and Golden pled not guilty; the jury trial was conducted by the same judge who sentenced Ellard. Longval was convicted on all indictments and sentenced to concurrent terms of 32 to 40 years on the two armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to be served from and after the sentences for armed robbery. The eight to ten-year sentence for assault with a dangerous weapon was in excess of the five-year statutory maximum. Mass. Gen. Laws Ann. ch. 265, § 15B. Golden was acquitted on all indictments.

On sentence appeal, the Appellate Division reduced Longval's sentence as follows: concurrent terms of 30 to 40 years on the armed robbery indictments and lesser terms as to the other sentences,[2] all to be served concurrently with the sentence for armed robbery.

Longval then appealed pursuant to Mass. Gen. Laws Ann. ch. 278, §§ 33A-G claiming that the court abused its discretion in sentencing, that the sentences were unlawfully disparate when compared with Ellard's terms, and, further, that the trial judge unconstitutionally punished him for exercising his right to trial. He subsequently filed a petition for a writ of

[1] The Massachusetts Supreme Judicial Court uses the term "indictments" to describe what would be called "counts" in federal parlance.

[2] The other reduced sentences were four to five years on the assault with a dangerous weapon charge, and eight to ten years on the charge of carrying a dangerous weapon.

error in the Supreme Judicial Court attacking his sentences. Because the petition referred to matters outside the record, the Single Justice, handling the matter, ordered the record on appeal expanded to include the transcript of Ellard's plea and sentencing. A special master was appointed to report on the substance of an unrecorded lobby conference between the court, counsel for defendant, and the assistant district attorney. The master held a hearing at which he received testimony from all but the trial judge.[3] Because defense counsel and the government prosecutor agreed that the trial transcript made no reference to the lobby conference in question, the master made his findings without reading the transcript. The master found that, before Longval had an opportunity to present his evidence, there was a lobby conference at which the judge stated in essence to defense counsel:[4]

> Mr. Primason, the evidence in this case as it is coming in is very serious, — robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial.

The Supreme Judicial Court affirmed the judgments of conviction, *Commonwealth* v. *Longval*, 390 N.E.2d 1117 (1980), and rejected appellant's claim that he was punished for exer-

[3] Both counsel were afforded the opportunity to call the judge as a witness, but chose not to do so; they did consult with him by telephone and he stated that, although one might have taken place, he could not recall any lobby conference.

[4] The government attorney could not remember the lobby conference and the special master's findings were, therefore, based largely on the testimony of Longval's defense counsel.

cising his right to trial. The court recognized the constitutional principle that a defendant is entitled to exercise his right to trial free from the threat of punishment, but did not "read the words of the judge ... as supporting an inference of ... punishment or threat of punishment," *id.* at 1120, and concluded that his statements were not "inappropriate." *Id.* It held that the widely disparate sentences as between Ellard and Longval were justified by their widely di parate criminal records.

Appellant next filed a petition for a writ of habeas corpus in the district court, charging that his due process rights had been violated because he was penalized for exercising his right to trial by jury. The court dismissed the petition without opinion and subsequently declined to certify probable cause, stating that the application and appeal were "frivolous." This court granted a certificate of probable cause on August 3, 1980. Before us, Longval presses the arguments that the trial court of the Commonwealth violated his constitutional rights by imposing a substantial prison sentence because he chose to plead not guilty and proceed to trial, that the Appellate Division's reduction of his sentence to 30-40 years does not expunge beyond a reasonable doubt the taint of unconstitutionality, and that the violation and its effects will not be removed unless he is sentenced de novo by a different judge.

With respect to appellant's first argument, we begin with the premise that those who choose to exercise the rights which our judicial system confers must be able to do so without fear of penalty. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Thus, the Supreme Court has protected defendants who exercise their right to appeal from possible vindictiveness on the part of the trial judge, *see North Carolina* v. *Pearce*, 395 U.S. 711 (1969), or the prosecutor, *see Blackledge* v. *Perry*, 417 U.S. 21 (1974). This court has held that the accused

"should not have to fear even the possibility," *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967), that he will suffer a penalty for exercising his rights. *See Lovett* v. *Butterworth*, 610 F.2d 1002, 1005 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 3038 (1980). The court in *Pearce* held that "due process ... requires that a defendant be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. In *Lovett*, we quoted approvingly the view that:

> "In effect, *Blackledge* sets up a per se rule ... that in some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or retaliatory motive to deter appeals." *Jackson* v. *Walker*, 585 F.2d at 143. "The semblance of vindictiveness that arises from the imposition of a harsher sentence the second time around must be obviated so that the proceedings do not leave the impression of unfairness to the defendant ... and so that other defendants are not deterred from exercising rights of appeal due to apprehension of vindictiveness." *United States* v. *Tucker*, 581 F.2d 602 (7th Cir. 1978). Otherwise the situation is too suggestive of the possibility of vindictive motive. "Due process of law requires that such a potential for vindictiveness not enter into [Massachusetts'] two-tiered appellate process." *Blackledge* v. *Perry*, 417 U.S. at 28, 94 S.Ct. at 2103.

610 F.2d at 1007 (footnote omitted).

The rationale of *Pearce-Blackledge* is applicable to the case at hand. Our review leads us to conclude that the judge's remarks could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury. The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its cap-

acity to do so. It matters not whether the trial judge actually meant to issue such a threat; whether his remarks could create a "reasonable apprehension of vindictiveness" is the issue. *Cf. Lovett* v. *Butterworth*, 610 F.2d at 1007. With all due respect and deference to the special master and the Supreme Judicial Court of Massachusetts, we believe the words of the judge could well have been understood by defense counsel as a "plea or else" admonition.

In reaching this view, we recognize once more that "it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *Worcester* v. *Commissioner of Internal Revenue*, 370 F.2d 713, 718 (1st Cir. 1966). The words of an outstanding federal trial judge bear repeating:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer of shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence.

United States ex rel. Elksnis v. *Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (footnote omitted). We readily accept the master's finding that the trial judge in this case acted with the best of intentions; but we think it clear that, viewed from the crucial perspective of the defendant, the judge's statements

could reasonbly have been understood as a threat.

A judge who participates in plea bargaining "is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant." *United States* v. *Werker*, 535 F.2d 198, 203 (2d Cir.), *cert. denied*, 429 U.S. 926 (1976).

Under the circumstances, this case must be remanded for resentencing. That the Appellate Division reduced the sentences does not remove the unconstitutional taint. In reaching its decision, it did not address the constitutional issues and did not have the report of the special master. Thus its consideration of appellant's sentence was necessarily limited to the disparity of sentences alone, and could not serve to remove the taint given that disparity by the trial judge's remarks. There are no absolutes as to whether a remand should be to the original judge or to another, *O'Shea* v. *United States*, 491 F.2d 774, 778 (1st Cir. 1974). The nature of the particular situation may vary from case to case. Generally, however, it "is difficult for a judge, having once made up his mind, to resentence a defendant." *Mawson* v. *United States*, 463 F.2d 29, 31 (1st Cir. 1972). Where, as in the case at hand, there exists the possible appearance of vindictiveness, then the case should be remanded for resentencing by a different judge. This fosters the appearance of justice, even though the sentencing judge may be able to act impartially.

The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice, other than the one who presided at his trial.

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APPENDIX "C"

COMMONWEALTH vs. NORMAN L. LONGVAL.

Essex. March 6, 1979. - June 12, 1979.

Present: Hennessey, C.J., Quirico, Kaplan, Wilkins, & Abrams, JJ.

Practice, Criminal, Sentence.

Indictments found and returned in the Superior Court on September 9, 1975.

The cases were tried before Donahue, J.

The Supreme Judicial Court granted a request for direct appellate review.

Beth H. Saltzman for the defendant.
Patrick J. Riley, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. The single issue presented by the defendant is whether State prison sentences imposed on him totaling forty to fifty years, and later reduced by the Appellate Division of the Superior Court to thirty to forty years, were

grossly and unlawfully disparate from a codefendant's sentences to three years in a house of correction and an additional term of probation.

Norman L. Longval, Richart T. Ellard, and Kenneth M. Golden were indicted jointly on two charges of armed robbery, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. All of the defendants appeared before a judge of the Superior Court on November 6, 1975.

Ellard pled guilty to all indictments and was sentenced as follows: two years in a house of correction on the assault by means of a dangerous weapon charge; one year in a house of correction on the motor vehicle charge, to be served from and after

the first sentence imposed; and three years probation on the armed robbery charge, to run from and after the second sentence imposed. The other indictments were filed.

Longval and Golden had a trial by jury from November 6 until November 10, 1975, before the same judge who sentenced Ellard. Longval was convicted on all indictments and was sentenced as follows: concurrent terms of thirty-two years to forty years at Massachusetts Correctional Institution, Walpole, on the armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to run from and after the sentences for armed robbery. The motor vehicle charge was filed. Golden was acquitted on all indictments.

As a result of a sentence appeal, Longval's sentences were reduced by the Appellate Division as follows: concurrent terms of thirty to forty years on the armed robbery indictments, and lesser terms as to the other sentences, all to be served concurrently with the sentences for armed robbery.

On his appeal pursuant to G. L. c. 278, SS 33-A-33G, Longval assigned one error dealing with the disparity between his sentences and those given Ellard. Subsequently, Longval filed a petition for a writ of error in this court attacking his sentences and referring to matters outside the record on appeal. A single justice of this court declined to issue the writ, but instead ordered the record on appeal to be

expanded to include the transcript of Ellard's plea and sentencing and, by report of a special master, to include the substance of an unrecorded lobby conference between the sentencing judge and the counsel in the case. After a hearing, the special master found that in an unrecorded conference during the presentation of the Commonwealth's case, the judge said to Longval's counsel: "[T]he evidence in this case as it is coming in is very serious - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I

might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial." The master found that the judge was referring to "very substantial sentences" imposed that month on three codefendants after jury verdicts of guilty.

At the hearing during which Ellard pleaded guilty, the prosecutor read a police report of the incident, which contained a statement given by one Arthur M. Kelley. According to that statement, Kelley and one Michael Coraine were working in a drugstore in Swampscott when a man came behind the prescription counter "jabbing" a shortbarreled gun at them and saying, "I want narcotics, the morphine,

all the Class A's." As Kelley filled bags with narcotics from the medicine cabinet, the man told Coraine to lie down and took a five-dollar bill from Coraine's wallet. Another man, Ellard, came up with a knife and told the first man to hurry up. The first man directed Coraine to open the cash register and told Kelley to lie still on the floor, saying, "If you move, I'll blow your brains out." Before leaving in a Chevrolet automobile, the men further threatened them, saying, "Don't move or we'll blow your brains out. Stay put for five minutes."

The police report further indicated that in response to a radio report, officers in a police vehicle chased the Chevrolet. A person on the passenger's side shot at them but missed.

During examination by the judge, Ellard said that he had suffered blackouts from drinking and had an alcohol problem but was not presently addicted to alcohol. Although admitting involvement in the crimes, he said he was drunk at the time, did not use the shotgun, and did not threaten anyone with the kife he carried.

After accepting Ellard's pleas, the judge heard the prosecutor's recommendation: a three- to five-year State prison sentence on the two armed robbery indictments to be served at a house of correction. Observing to defense counsel that "we had an informal conference on this matter this morning," the judge said, "I have gone through the probation record, and I'm aware that this defendant

has not been in any real serious trouble prior to this event of June of this year. And I think his problem is primarily alcohol." Defense counsel added "[F]or the last eleven years he has had a problem, and as a result has lost jobs, his family, his wife," and asked that the assistant district attorney's recommendation be adopted. The judge, in imposing sentences totaling three years in the Billerica House of Correction and a consecutive term of three years' probation, noted that alcohol treatment was available at Billerica. He also imposed as a special term of probation that Ellard "seek and sustain alcoholic treatment."

At Longval and Golden's trial, the Commonwealth called seven witnesses.

Kelley and Coraine testified in a manner generally consistent with Kelley's statement to the police. They identified Longval as the man who carried the shotgun while in the pharmacy. Neither witness could identify Golden or say whether he was in the getaway car.

Police witnesses identified Longval as the driver of the green Chevrolet they chased and Golden as the front seat passenger who shot at them while the car was taking a curve at a high speed, about 150 feet in front of their cruiser. They described the arrests of Longval and Golden at separate locations in Marblehead, Golden denied participation in the crimes and said he had been jogging.

After the Commonwealth rested, Longval testified. Longval stated that he went to the Bickford Pharmacy with Ellard in a car he previously had stolen, and that no third person accompanied them. Inside the pharmacy, Longval carried the gun, which he had obtained from a friend of Ellard. He further testified that during the chase, he drove and Ellard used the gun to shoot at the police; that Golden was not present and did not participate in the crimes; and that he first saw him that day at the Swampscott police station. Golden did not testify.

After the jury convicted him on all indictments, Longval was sentenced. The prosecutor recommended a State prison sentence of thirty-two to forty years for armed robbery and a consecutive eight- to

ten-year sentence for assault by means of a dangerous weapon. He made no recommendation on the remaining indictments.

Defense counsel advised the judge that Longval was thirty-six years old. Stating that his client had testified "in an effort to see to it that justice was done in a case of a fellow he felt was wrongfully accused," counsel suggested that "the Court should take into consideration that factor in his favor." Counsel acknowledged that Longval was no stranger to the courts, had a previous record for larcenies, and had served a five- to eight-year sentence at the Correctional Institution at Walpole for armed robbery. However he pointed out that the record reflected an involvement with narcotics as early as 1960 and, except for

the armed robbery conviction, a "rather obvious lack of violence."[1/]

Defense counsel suggested that the crimes were serious, but that a sentence of fifteen to thirty years would be adequate punishment. He made no mention of the sentences given Ellard.

Essentially adopting the prosecutor's recommendation, the judge sentenced Longval to State prison terms totaling forty to fifty years. He gave no reasons for the sentences imposed. Subsequently, after a hearing, the Appellate Division of the Superior Court reduced Longval's sentences. The revised sentences totaled

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1/However, the judge had learned that Longval had recently escaped from the Salem House of Correction and that a firearm had been involved.

thirty to forty years at Walpole.[2/]

We turn first to the defendant's assertions based on constitutional considerations. The defendant, we think correctly, does not rely on the constitutional prohibitions against cruel and unusual punishment, as contained in the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. See Commonwealth v. O'Neal, 369 Mass. 242, 246-250 (1975) (Tauro, C.J., concurring), and cases cited. These constitutional principles do not reach this case. The applicable statute, G. L. c. 265, § 17,

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2/In so doing the Appellate Division corrected one of the lesser sentences which exceeded the statutory limit but which was a concurrent sentence and did not affect the total time to be served.

establishes the extreme seriousness of the crime of armed robbery, in its provision that sentence may be imposed of any term of years up to life imprisonment.

Rather, the defendant argues that to the extent a trial judge punishes a defendant for having a trial by jury, he commits constitutional error, citing United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973), or at least abuses his discretion, citing United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960). We agree with the defendant's premise. However, it is not applicable here, on the facts of this case. We do not read the words of the judge, quoted supra, as supporting an inference of such punishment or threat of

punishment. His words directed the attention of defense counsel to sentences he had imposed in other unrelated cases; they commented on the serious nature of the offense as shown in the evidence at the trial; and they advised the defendant through his counsel, not to forgo any advantage that might accrue to the defendant by means of plea bargaining and a resulting recommendation to the court by the prosecutor, as to the sentence.

There was nothing inappropriate in thse comments by the judge. To read into the words the meaning now urged by the defendant is to strain their plain language. Even if we were to accept the premise that there is ambiguity in the phrasing, we would decline to reach as far

as the defendant does to force an inference of an unlawful meaning in the words.

Beyond the constitutional arguments, the defendant urges that this court should correct "legal error" in the sentence imposed. It is true that error of law which occurs in sentencing is an appropriate matter for appellate relief. See Commonwealth v. Sitko, 372 Mass. 305, - (1977);[a/] Commonwealth v. LeBlanc, 370 Mass. 217, 222-225 (1976); Commonwealth v. Franks, 369 Mass. 608, 609 (1976). Yet, in this case there was no error of law; the sentences imposed were within the broad discretion afforded to the judge in the statutes. However, the defendant argues that there is such great disparity

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a/Mass. Adv. Sh. (1977) 668, 676-678.

between the punishment of Ellard and the defendant as to require a remedy.

The defendant concedes that his premise is unprecedented in this jurisdiction. The Appellate Division of the Superior Court is the appropriate forum for relief against unfair disparity, and in this case the Appellate Division has already afforded a large measure of relief in reducing the sentence by ten years. However, the defendant argues that special principles apply to the sentencing of coparticipants in the same crime, and that equal participants should be given comparable sentences, at least where they have similar backgrounds, citing United States v. Williams, 499 F.2d 52, 56 (1st Cir. 1974),

and Burleson v. State, 543 P.2d 1195, 1201 (Alaska 1975).

We agree that this court should review sentences for errors of law or constitutional violation, but we do not accept the premise that we ordinarily have jurisdiction to review for alleged disparity. We do not say that there may never be a case in which the sentence is so severe or the demonstrated disparity so great as to amount to an abuse of discretion and, thus, present an appropriate subject for our review. See G. L. c. 211, § 3. We add that, even were we to reach the merits of this case, and consider what is urged here to be wide disparity of punishment between coparticipants, we can see ample

justification for the sentences imposed. In addition to the nature of the offense, a wide variety of factors can be taken into account, such as the defendant's character, background and prior record. Commonwealth v. Celeste, 358 Mass. 307, 310 (1970). Letters v. Commonwealth, 346 Mass. 403, 405 (1963). While the defendant concedes that he appartnely conceived and led the robbery, and carried the more dangerous weapon inside the pharmacy, he argues that there was similarity between the two men in age, background, and participation in the robbery.

The Superior Court judge, and subsequently the Appellate Division, were justified in concluding that widely disparate sentences, as between Ellard and

the defendant, were warranted by their widely disparate criminal records. By consent of the parties, we have examined the prior records of both men. Ellard's record may fairly be said to include a number of prior offenses, but all of minor or trivial nature, with none involving violence or the likelihood of violence until he was involved in the instant armed robbery. The defendant, on the other hand, has a record of almost twenty years of repeated, serious offenses, most involving stealing in some form, and some involving breaking and entering. He has served prison terms on a number of occasions. Perhaps overriding importance is the fact that the defendant served a prior five- to eight-year sentence for armed robbery. In all, the judge could conclude, and

obviously did, that the defendant was a confirmed and dangerous offender.[3]

Judgments affirmed.

3/We do not consider the arguments that another judge might not have sentenced the defendant so severely, or that the judge should have made written findings as to the sentence imposed, especially since a coparticipant was sentenced. These questions concern the greater issue as to whether the sentencing discretion of judges should be limited, and this is a matter now under legislative consideration.

APPENDIX "D"

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FULL COURT NO. 1635

COMMONWEALTH OF MASSACHUSETTS

vs.

NORMAN L. LONGVAL

REPORT OF SPECIAL MASTER
AND COMMISSIONER

Background Findings

1. On this appeal from conviction of Longval on various indictments (R. 2-8), certain expansions of the record were made in the Appeals Court in the manner described on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review". A copy of that page 3 is annexed marked Annex 1. By order

of the Full Court dated November 21, 1978 (copy annexed marked Annex 2), the matter of expanding the record in respect of the lobby conference, asserted to have taken place in the footnote on page 3 of Annex 1, was referred to me to report the facts as found by me concerning the existence of such a conference and the events and discussion, if any, there taking place.

2. After a pretrial conference, I held a hearing on November 28, 1978, at which testimony was offered by present counsel for Longval and by an Assistant District Attorney from Essex County. The testimony was somewhat conflicting.

Trial counsel for Longval (Mr. Primason) testified to facts upon which I largely base the findings made by me below

in paragraphs 3 to 7. The former Assistant District Attorney who tried the cases for the Commonwealth (Mr. Kelleher) remembers no bench or lobby conference during the trial of these cases in which any discussion of plea bargaining went on. Both present counsel agreed before me (1) that the trial transcript shows no such conference and (2) that there was no occasion for my reading any part of the trial transcript.

Findings Concerning Alleged Conference

3. The criminal cases against Longval were tried at Lawrence before Judge Donahue from November 6 until November 10, 1975. R. 1. The defendant was represented by Mr. Webb Primason, then a young attorney

with the Massachusetts Defenders Committee, with his office in Salem. It was his first representation of a criminal defendant before a jury. The Commonwealth was represented by Mr. Richard Kelleher, an Assistant District Attorney. Each of them testified before me. Each of them appeared to me to be testifying honestly and truthfully. Mr. Kelleher had no memory of any 1975 conference in the Judges' lobby or elsewhere in which plea negotiations were mentioned. He conceded that there might have been such a conference but has no memory of one. Mr. Primason remembers such a conference in the Judges' lobby at which Judge Donahue, Mr. Primason, and Mr. Kelleher were present but at which no clerk or court stenographer was present. It was

the first time Mr. Primason had been in Judge Donahue's lobby and (as noted above) the first jury criminal case he had tried.

4. Mr. Primason does not remember the occasion for the lobby conference, but now thinks that it was called by some party or the judge for a discussion of some matter other than plea negotiations. His recollection is that the lobby conference took place during the presentation of the Commonwealth's case, but before the Commonwealth had rested, and that other witnesses were called by the Commonwealth after the conference. Mr. Primason, however, conceded that as to (a) the occasion for, and (b) the time in the trial of, the conference his memory is not

precise and that his memory may be faulty. I regard these matters mentioned above in this paragraph as unimportant and largely immaterial. I personally pressed him, after somewhat general testimony, to be as precise as possible concerning what Judge Donahue said, and he replied (and I find his statement to represent the facts) that Judge Donahue said in substance the following (not purporting however, to quote the Judge with much precision,) - Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client

to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. See par. 5, below. [I took careful and almost verbatim notes of this answer and read my notes back to Mr. Primason. He said that this statement is accurate to the best of his memory.]

5. The reference to a previous trial was to a sentence imposed by Judge Donahue in criminal cases (against defendants named Hogan, Aterone, and LaRocque) tried in Lawrence late in October, 1975, or early November, 1975. These cases involved kidnapping of a woman (wife of the debtor

mentioned later and mayhem against that debtor (who owed money to a codefendant) to coerce payment of the debt. Judge Donahue had imposed very substantial sentences after jury verdicts of guilty. Nothing in the context of the conference as described to me in testimony led me to construe the Judge's remarks as in any sense a threat but merely as a statement to a young lawyer of the Judge's then general impression of the evidence as it had developed to that point. There was (as Mr. Primason testified) no reference by the Judge at the conference to a sentence of "fifteen to twenty years". No specific term was mentioned during the conference.

6. There had been, before trial, a plea bargaining conference between the

Assistant District Attorney, Mr. Kelleher, and a Mr. Chouinard, counsel for one Golden, a codefendant. Mr. Primason had been present at that conference solely for the purpose of keeping informed. He had not participated in any plea bargaining because he had not been authorized to do so by his client, Longval. At that conference, Mr. Chouinard had asked if the Assistant District Attorney would recommend fifteen to twenty years in the event of a plea of guilty by Golden. Mr. Kelleher had consulted a senior assistant and the Swampscott prosecutor, a lieutenant Cassidy, who felt the case against Golden was "air tight". No recommendation was made.

7. Mr. Primason reported to his client Longval the discussion at (a) the

lobby conference and (b) the pretrial plea bargaining conference. The petition for a writ of error, Supreme Judicial Court, Suffolk No. 78-155 CIV, and the footnote on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review." (see Annex 1), were prepared, in good faith, by Longval's present counsel (Miss Susan J. Baronoff of the Massachusetts Defenders Committee) on the basis of information furnished to her by Longval. I find and conclude that those documents (especially paragraph 6 of the petition for a writ of error) do not accurately state what went on at the lobby conference and that information about that conference was inaccurately conveyed to Miss Baronoff. The footnote to Annex 1

greatly overstates and misstates the Judge's remarks at the lobby conference, as disclosed in testimony before me.[1/]

8. At the close of the testimony before me, I afforded counsel opportunity to consult Judge Donahue to see whether they, or either of them, wished to call him as a witness before me. They did consult the Judge and decided not to call him as a witness. He, by telephone, had expressed willingness to appear and testify before me if called. He said he could not recall any lobby conference at this late date although one might have taken place. In view of

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1/I make no finding on the cause of the misinformation furnished to Miss Baronoff or how it occurred. See p. 2 of her objections and suggestions attached as Annex 3.

counsel's position, I saw no occasion for inquiry of the Judge.

9. I find and conclude that the facts concerning the conference are as stated in the foregoing report.

10. I attach as Annex 3, the objections and suggestions to my draft report filed by Miss Baronoff. I have added footnote 1, page 6, supra, to meet her second objection.

As to her objection to the next to last sentence of par. 5, page 5, supra, any conclusion in that sentence reflects my reaction to all Mr. Primason's testimony. The specific statement of what Judge Donahue said at the lobby conference appears in par. 4, page 4, above.

11. A copy of a draft report (in all substantial respects as it appears above,

except for pars. 10 and 11, footnote 1, page 6, and annex 3) was sent to counsel on December 1. Each attorney has notified me that he or she does not desire to be heard further before me.

Respectfully Submitted,

Special Master and
Commissioner

December 7, 1978